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Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
IO98 Biennial Regulatory Review -)	CC Docket No. 98-171
Streamlined Contributor Reporting)	
Requirements Associated with Administration)	
of Telecommunications Relay Service, North)	
American Numbering Plan, Local Number)	
Portability, and Universal Service Support)	
Mechanisms)	
)	
Telecommunications Services for Individuals)	CC Docket No. 90-571
with Hearing and Speech Disabilities, and the)	
Americans with Disabilities Act of 1990)	
)	
Administration of the North American)	CC Docket No. 92-237
Numbering Plan and North American)	NSD File No. L-00-72
Numbering Plan Cost Recovery Contribution)	
Factor and Fund Size)	
)	
Number Resource Optimization)	CC Docket No. 99-200
)	
Telephone Number Portability)	CC Docket No. 95-116
)	
Truth-in-Billing and Billing Format)	CC Docket No. 98-170

**EARTHLINK SECOND FURTHER NOTICE REPLY COMMENTS
AND STAFF STUDY COMMENTS**

EarthLink, Inc., by its attorneys, files these reply comments on the Commission's *Second Further Notice of Proposed Rulemaking* and comments on the *Staff Study* in the above-captioned proceeding.¹ In this proceeding, EarthLink urges the Commission not to adopt contribution

¹ *In the Matter of Federal-State Joint Board on Universal Service et al., Report and Order and Second Further Notice of Proposed Rulemaking*, 17 FCC Rcd. 24952 (2002) ("Second Further

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mechanisms that will raise costs for the provision of Internet access services to the American public. Further, as described below, the FCC should reject commenters' arguments for charging USF to Internet service providers ("ISPs") directly. Independent ISPs and other end users already pay for USF in the form of carrier pass-through charges, and the FCC should avoid regulatory changes in this proceeding that result in additional costs for delivering ISP services. To avoid USF rate hikes on Internet access, the FCC should clarify that, consistent with the concept of an end-user "connection," services provided to ISPs that are intermediate in nature, such as modem aggregation services aggregating traffic to ISPs, are not subject to USF.²

DISCUSSION

1. USF Contribution Obligations Do Not Apply To ISPs

The *Second Further Notice* clearly stated that ISPs would not be considered a potential USF contributors in this proceeding: "We note that we are not proposing to directly assess Information Service Providers, as proposed by SBC and BellSouth."³ Despite this, some commenters continue to argue that ISPs should be forced to comply with the FCC's USF regulations, including payment and reporting obligations.⁴ This argument has been attempted and has lost several times, and the Commission should either ignore or reject it once again.

The Commission has determined that there is no legal basis for imposing upon independent ISPs USF contribution obligations or the many regulatory filing requirements for

Notice"); "Commission Seeks Comment on Staff Study Regarding Alternative Contribution Methodologies," *Public Notice*, FCC 03-31 (rel. Feb. 26, 2003) ("*Staff Study*").

² *Second Further Notice*, ¶ 41.

³ *Second Further Notice*, at n. 181. See also, *id.*, ¶ 67 (information services "would not be subject to a separate assessment" under a connection-based approach "because the information service does not provide access to a public network that is independent from the voice-grade connection.").

⁴ See, e.g., Comments of the Western Alliance at 6, 8-9 (filed Feb. 28, 2003); Comments of United States Telecom Association at 10 (filed Feb. 28, 2003).

USF contributors. Section 254(d) of the Act sets forth only two classes of universal service contributors: (1) “every telecommunications carrier that provides interstate telecommunications services,” *i.e.*, mandatory contributors; and (2) “any other provider of interstate telecommunications . . . if the public interest so requires,” *i.e.*, permissive contributors. 47 U.S.C. § 254(d). **As** the Commission has explained, independent ISPs fit neither of the two USE contributor categories.⁵

Further, proposals to impose USE contribution regulations directly upon ISPs would also be inconsistent with both of the connection-based proposals as well as the telephone number-based proposal. Commission precedent would also yield that independent ISPs do not provide consumers with a “connection.”⁶ The telephone-number based proposal also would not apply, since independent ISPs do not provide consumers with telephone numbers for Internet access services

II. Prior to Contribution Reform, the FCC Should Consider Carefully Ways to Avoid Cost Increases for Dial-Up Internet Access Services

EarthLink believes that the ramifications of the contribution reform proposals on the provision and costs of Internet access to the public have not been fully considered. The *Sluff Study*, however, suggests that certain aspects of the contribution proposals would raise significant new costs for existing dial-up Internet access services, if implemented “as is.” The impact on dial-up Internet access **is** acute because all of the contribution reform proposals

⁵ *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd. 8776, ¶ 788 (1997) (ISPs “are not required to contribute to support mechanisms to the extent they provide such services”); *Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd. 11501, ¶¶ 32, 144 (1998) (“The Act imposes no regulatory obligations on information service providers as such”; FCC excluded ISPs from USF “contribution requirements based on the plain language of section 254(d).”).

⁶ *Id.*

contemplate specific price increases and/or new costs for certain aspects of telecommunications typically used by dial-up ISPs, including modem aggregation services, T1 lines, and telephone numbers. Assuming that carriers would, in turn, pass through these additional USF costs to their ISP customers, these contribution reform proposals would raise the costs of providing ISP services and, potentially, consumer prices for Internet access.

EarthLink highlights the following potential impacts of the proposals on typical dial-up Internet access service:

1. *USF costs of T1 access lines would soar* -- Dial-up ISPs use many T1 access lines configured as exchange service trunks to connect incumbent LEC switches to modem banks. According to the *Staff Study*, the USF costs for each T1 line under either of the two connection-based plans would *increase two-to-four times* as compared to the costs under the current revenue-based plan. For example, according to the *Staff Study*, the USF cost in 2004 for each T1 line configured as 20 presubscribed exchange service trunks would go from \$13.45/month under the revenue-based plan to \$52.38/month (under connection-based proposal 1) and \$22.63/month (under connection-based proposal 2).

2. *New Costs for Telephone Numbers* -- As the Commission is aware, residential end users typically gain access to the Internet by dialing a local telephone number that has been assigned to the customer's ISP and, once answered, a circuit connects the ISP and the customer's modem. Thus, dial-up Internet service employs many telephone numbers so that the ISP's modem banks and the exchange access circuits are available when consumers dial in to their ISPs. Indeed, national ISPs such as EarthLink use thousands of telephone numbers to support a nationwide dial-tip ISP service. The addition of \$1/month/telephone number, as proposed under the

telephone-number approach and as explained in the *Staff Study*, would add significant new and different cost drivers to the business of providing dial-up Internet access.

3. *New Costs for Modem Aggregation and ATM Services* – EarthLink and many other ISPs use services provided by carriers to aggregate Internet traffic from end users. On the dial-up side, ISPs use carriers’ modem aggregation services, which take traffic from the central office using modem banks and then transport the traffic to the ISP’s connection point.’ For ADSL-based services, the ATM networks of incumbent LECs aggregate Internet traffic from various DSLAMs across a geographic area (such as a **LATA**). As EarthLink explains below, such services should not constitute independent “connections.” If, however, the Commission were to assess a connection-based USF charge, the impact of such a regulatory change is unclear and could impose unintended costs on ISPs and their customers. For example, the rates for such modem aggregation services could vary significantly simply because of the FCC’s regulatory changes and the particular existing configuration of the service (*i.e.*, whether the ISP connects to a modem aggregation service using a TI connection (20 exchange service trunks)) or a “TI interstate private line.”⁸

111. “Connection” Should Be Defined In a Manner That Recognizes The Unique Nature of Internet Communications

Should the Commission adopt a connection-based proposal, EarthLink urges the Commission to define “connection” in a way that accounts for the fact that intermediate transport between the residential end user and the ISP is not an independent “connection.” In a connection-based proposal, with a dial-up Internet communication, the residential end user

See, e.g., Pacific Bell, Tariff F.C.C. No. 1, § 21 (Internet transport access service); Verizon, Tariff F.C.C. No. 1, § 16 (IP (Internet protocol) Routing Service).

⁸ *Staff Study*, at 5

connects to the public network using a residential loop connection, and the incumbent LEC would pay a residential USF charge for that connection. In that same communication, the ISP also purchases T1 or special access circuits and its carrier would likewise pay connection-based USF for such circuits. The transport that lies *between* the ISP connection and the end user connection (*e.g.*, modem aggregation services or ATM services), however, is not a “facilit[y] that provides end users with access to a public or private network.”⁹ Indeed, the two “connections” are assessed a USF charge and the carriers of both would pay for their respective connections. There would be no need for further USF assessments. Not only does this conclusion follow from the plain meaning of what is a “connection” for the two users, it is also necessary to avoid unintended regulatory effects on existing service arrangements, for example by forcing a reconfiguration of the telecommunications components that make up modem aggregation services to minimize USF charges.

Moreover, while the *Second Further Notice* states the Commission would defer consideration of whether and how to assess ADSL services pending review of its regulatory classification,¹⁰ the proposed plans would potentially impact the costs on ADSL services under the proposals.” EarthLink believes that the FCC must, as a threshold matter, consider whether ADSL service should be deemed a “connection” under the first proposal and, if so, whether

⁹ *Second Further Notice*, ¶ 76. *Cottipure*, Comments of AT&T at 8-9 (filed Feb. 28, 2003) (modem aggregation services should be subject to both capacity and telephone number charges).

¹⁰ *Id.*, at ¶ 76. EarthLink does not comment here on the merits or outcome of the *Wireline Broadband* docket, but rather the regulatory treatment of ADSL services under the three USF proposals presented in the *Second Further Notice*. EarthLink raises these matters here since the *Second Further Notice* does not explain whether there will be an additional proceeding to consider the proposed USF plans as applied to ADSL services, and it is appropriate because the *Staff Study* has simply assumed that ADSL services would contribute under the proposals.

¹¹ *Staff Study* at 14 (assuming growth of ADSL services).

ADSL should be considered residential or business service where the independent TSP purchases the ADSL at bulk for use as an input for residential high-speed service

In EarthLink's view, it is questionable whether wholesale ADSL service riding across the same copper loop as wireline voice exchange service meets the definition of "connection" since it is not "*a facility*" that provides end users with access to an interstate public or private network." Wholesale ADSL is not "a facility;" it is a service offering riding on a facility – the local loop, or the high-frequency portion of the loop. The terms of ADSL service typically require the end users to be incumbent LEC voice customers¹² and ADSL is commercially successful, in part, because it uses the existing and ubiquitous loop "facility" already deployed and operating. Moreover, if a connection-based plan is beneficial, it is because it is *simple* for millions of residential consumers: one USF charge is appropriate for all residential end-users with a copper loop "connection." As the *Second Further Notice* (§ 70) points out, proponents also argue that the connection-based method is *stable* for the fund since residential line growth itself is stable. A connection-based plan, however, that charges USF for ADSL undermines simplicity and stability, and would be both complicated and expensive for consumers. For the consumer, additional USF charges would apply for each additional telecommunications application running on the residential line. Without a "one line, one charge" approach, a DSL-based subscriber would initially face at least two USF-related charges with possible additional USF charges for each service (e.g., video conferencing, video-on-demand, etc.) that is "layered"

¹² SBC Advanced Solutions, Inc., Generally Available Terms and Conditions, § 6.2.2 (DSL offered over "an SBC ILEC-provided . . . retail POTS line"); Verizon, Tariff F.C.C. No. 20, § 5.1.2.D&F. To the extent some parties may claim that DSL provides a "connection" independent from voice-grade service, these arguments are weak, at best. After all, long-distance providers could be said to "connect" users to public networks independent from the local exchange carrier network, and yet the COSUS connection-based approach does not propose to assess long-distance carriers.

onto the high-frequency portion of the loop. The goal of a simple and single residential USF charge would be lost. In the same way, if each layered service on a residential line is subject to a separate USF assessment, the “stability” of residential line counts is compromised, as each new residential service could count as a new “connection.””

Finally, while the *Staff Study* has included ADSL in its projected assessments, in EarthLink’s view, the issue of how the proposed contribution reforms would apply to ADSL services needs to be explored more fully in a proceeding before any USF contribution changes can apply to ADSL services. First, it is unclear to EarthLink (assuming *arguendo* that ADSL is considered a “connection”) whether ADSL would be treated as a “residential” service or as a “business” service under a connection-based plan. For example, under the proposed definition of “connection,” one could conclude that the service is for the residential end user and so should be subject to treatment as “residential” even though the independent ISP actually purchases wholesale ADSL. Treatment as “residential” would also avoid fluctuation of pass-through USF charges to residential consumers, which may result if the ADSL is treated as a multi-line business service. Second, and perhaps most significantly, the proposed capacity tiers would have a potentially significant effect on the price of ADSL service. Many ADSL services today are currently offered at “Tier 2” speeds (*e.g.*, Verizon’s ADSL is offered at 768 Kbps/128 Kbps)¹⁴ which would subject it to *sixteen times the Tier 1 rate*. Assuming that a Tier 1 rate is \$1/month

¹³ Similarly, it is unlikely that an offsetting effect on total connections would occur, *i.e.*, that total voice-grade services would decline as ADSL services increase. While the *Staff Study* (at 13) states that residential primary lines may decline “because staff assumes that some customers will be able to obtain voice services via broadband Internet access and will discontinue local wireline service,” this assumption is incorrect for ADSL-based subscribers who cannot discontinue voice service and retain ADSL service under current ADSL terms of service. *See* n. 11, above.

¹⁴ Verizon FCC Tariff No. 20, Part 111, § 5.1.6 (ADSL service offered at 768 Kbps downstream and 128 Kbps upstream).

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or more, the impact on DSL-based services would be overwhelming (50% of the recurring rate) and entirely inipractical. In any cvent, if the Commission adopts a connection-based plan, EarthLink urges the Commission to apply such changes in a manner that minimizes the negative impact *on* residential adoption of ADSL-based Internet services

CONCLUSION

EarthLink urges the Commission to reform the USF contribution mechanism in a manner that promotes the continued access to the Internet for the American public, especially as its regulatory changes may impact the costs of providing ISP services.

Respectfully Submitted,

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